

**AGREEMENT BETWEEN THE CITY OF SAN JOSE AND
_____ FOR INVESTMENT PROVIDER
SERVICES FOR THE CITY OF SAN JOSE DEFERRED
COMPENSATION PLAN**

THIS AGREEMENT is made and entered into effective the ____ day of _____, 2006, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California (the "City"), and _____, a _____ of the State of _____ (the "Contractor").

WHEREAS, the City of San José has established and maintains the City of San José Deferred Compensation Plan (the “Plan”) as an eligible deferred compensation plan pursuant to Section 457 of the Internal Revenue Code; and

WHEREAS, pursuant to San José Municipal Code Section 3.48.060, the Deferred Compensation Advisory Committee (the “DCAC”) administers the Plan and has the authority to determine all questions arising out of the administration, interpretation, and application of the Plan, including making decisions on behalf of the City as to the choice and nature of investments to be available under the Plan; and

WHEREAS, the DCAC established a Subcommittee to issue a request for proposals (“RFP”) for investment providers for the Plan, to evaluate responses to the RFP, and recommend to the DCAC an entity or entities to provide investment and administrative services for the Plan; and

WHEREAS, on March 1, 2006, the Subcommittee issued the RFP on behalf of the City; and

WHEREAS, the Contractor submitted a response to said RFP dated _____, 2006; and

WHEREAS, the Contractor provides investment vehicles appropriate for investment of funds held in trust in an eligible deferred compensation plan; and

WHEREAS, in addition to serving as an investment provider, the Contractor provides a complete offering of services to public employers for the investment and administration of eligible deferred compensation plans including, but not limited to, account maintenance, recordkeeping, investment reporting, tax reporting, form processing, and benefits disbursement; and

WHEREAS, the Subcommittee has recommended that the Contractor be selected to provide investment and administrative services for the Plan; and

WHEREAS, on _____ 2006, the DCAC accepted the Subcommittee's recommendation; and

1 **WHEREAS**, the City and the Contractor desire to enter into an agreement
2 whereby the Contractor will provide investment and administrative services for the Plan;
3 and

4 **WHEREAS**, pursuant to San José Municipal Code Section 3.48.060, the DCAC
5 has the authority to enter into this Agreement on behalf of the City;

6 **NOW, THEREFORE, THE CITY AND THE CONTRACTOR HEREBY AGREE**
7 **AS FOLLOWS:**

8 **SECTION 1. TERM OF AGREEMENT.**

9 The initial term of this Agreement shall be from _____, 2006, to
10 September 30, 2010, inclusive, subject to the provisions of SECTION 29. The DCAC
11 may, on behalf of the City, exercise an option to extend the term of this Agreement for
12 up to an additional two years.

13 **SECTION 2. DEFINITIONS.**

14 For the purposes of this Agreement, the following terms shall have the meanings
15 set forth below:

- 16 A. “City” means the City of San José.
- 17 B. “Contractor” means _____.
- 18 C. “DCAC” means the Deferred Compensation Advisory Committee of the City of
19 San José.
- 20 D. For the purposes of compensation deferrals, “participant” is limited to
21 participant as defined in San José Municipal Code Section 3.48.030 and
22 Section 457 of the Internal Revenue Code. For all other purposes,
23 “participant” includes participants (as defined in San José Municipal Code
24 Section 3.48.030 and Section 457 of the Internal Revenue Code), persons
25 who have left City employment (whether by retirement or otherwise) and have
26 investments in funds offered by the Contractor, beneficiaries, and
27 nonemployee former spouses for whom a separate account has been
28 established pursuant to a conforming domestic relations order meeting the
29 requirements of San José Municipal Code Section 3.48.181.
- 30 E. “Plan” means the City of San José Deferred Compensation Plan set forth in
31 Chapter 3.48 of the San José Municipal Code.
- 32 F. “Secretary to the DCAC” includes the Secretary’s designee.

33 **SECTION 3. RESPONSIBILITIES OF THE CONTRACTOR.**

- 34 A. The Contractor shall be solely responsible for the performance of all services
35 under this Agreement and for its employees who perform such services.

- 1 B. The Contractor acknowledges that under San José Municipal Code Section
2 3.48.025 the Plan assets are held in trust by the City for the exclusive benefit
3 of participants and their beneficiaries. The Retirement Corporation will act as
4 a fiduciary for the Plan and will perform its duties and responsibilities under
5 this Agreement with the care, skill and prudence of a fiduciary.
- 6 C. The Contractor shall perform all services under this Agreement in compliance
7 with the requirements for eligible deferred compensation plans under Section
8 457 of the Internal Revenue Code. However, the Contractor shall not be
9 responsible for the eligible status of the Plan to the extent status is affected
10 by provisions of the Plan document (San José Municipal Code Chapter 3.48)
11 which are inconsistent with Section 457 requirements, and shall not be
12 responsible for the eligible status of the Plan in the event the City directs the
13 Contractor to administer the Plan or disburse assets in a manner inconsistent
14 with Section 457 requirements.
- 15 D. *[Insert provisions relating to provision of computers for use by the City in*
16 *connection with the Plan – depends on accepted proposal.]*
- 17 E. The Contractor shall be responsible for the accuracy of information provided
18 to participants and the City by the Contractor. However, the Contractor may
19 rely on investment performance information provided to the Contractor by
20 industry-recognized sources such as Morningstar, the *Wall Street Journal* or
21 other recognized industry publications. In any case where the Contractor or
22 the City identifies a discrepancy or an error in information provided by the
23 Contractor, the Contractor shall correct the information previously provided
24 within five (5) days of the Contractor's discovery, or the City's notice to the
25 Contractor, of the discrepancy or error.
- 26 F. The Contractor shall advise the DCAC in a timely manner of any changes in
27 federal or state laws or regulations of which the Contractor may become
28 aware that may affect the validity or administration of the Plan or the
29 Contractor's duties under this Agreement. The Contractor shall not be liable
30 for the effect of any such changes on the Plan or the status of the Plan as an
31 eligible deferred compensation plan.
- 32 G. A representative of the Contractor shall attend the monthly meetings of the
33 DCAC and such other meetings of the DCAC as are mutually agreed by the
34 Contractor and the Secretary to the DCAC.

35 **SECTION 4. INVESTMENT FUNDS.**

- 36 A. Beginning October 1, 2006, the Contractor shall provide investment funds
37 appropriate for the deferral of compensation by participants of an eligible
38 deferred compensation plan. *[Additional provision describing the investment*
39 *funds – depends on proposal accepted.]*
- 40 B. The investment funds that the Contractor is authorized to provide to Plan
41 participants as of October 1, 2006, are listed in EXHIBIT A, and the

Contractor shall continue to provide each such fund until such time as the DCAC directs the discontinuation of that particular fund. Prior to offering any additional or replacement investment fund to participants of the Plan or accepting any deferrals for investment in such additional or replacement fund, the Contractor shall present the fund to the DCAC and obtain the approval of the DCAC to offer the fund to Plan participants.

- C. Investment funds offered to Plan participants by the Contractor shall have no restrictions on fund-to-fund transfers or on transfers to funds offered by another investment provider, except as follows:

[Exceptions, if any – depends on proposal accepted.]

- D. The Contractor acknowledges that the DCAC has adopted an Investment Policy which establishes asset classes in which funds are to be offered to participants. The Contractor shall endeavor to provide at least one investment fund in each asset class. The Contractor may make recommendations to the DCAC for the addition or deletion of asset classes; however, the selection of asset classes is within the discretion of the DCAC and the Contractor shall bear no responsibility for the selection of asset classes offered in the Plan.

- E. The Contractor acknowledges that the DCAC has established performance benchmarks for investment funds in various asset classes, and the DCAC reserves the right to discontinue any investment fund which does not meet the established benchmark. The Contractor will, upon the request or direction of the DCAC, discontinue offering any underperforming fund, replace it with an alternative investment fund in the same asset class, and provide education to participants in the replaced fund to assist participants in the selection of a replacement fund.

SECTION 5. ENROLLMENT/ACCOUNT SERVICES.

- A. The Contractor shall perform the following enrollment and account services:

1. Assist the City in the enrollment of all employees who elect to participate in the Plan and direct deferrals to investment funds offered by the Contractor.
2. Establish an account and appropriate sub-accounts for each participant.
3. Provide not less than _____ () qualified account representatives to provide ongoing financial assistance to Plan participants. Such assistance shall include on-site individual counseling in such matters as investment funds available for deferral of compensation, transferring deferrals among funds, catch-up provisions, withdrawal and disbursement options, designation of beneficiaries, and completion of forms necessary to implement any of the foregoing. At least one (1) of

these account representatives shall maintain offices within the City of San José.

4. Provide, at the Contractor's sole cost and expense, enrollment forms, customized for the City's Plan as required by the Secretary to the DCAC.

5. Send quarterly statements to all participants, and to the City, detailing beginning and ending balances in each fund and detailing all transactions or other activity occurring during the quarter.

B. Personnel of the Contractor responsible for assisting the City in enrolling employees in the Plan or for providing on-going financial assistance to participants shall be full-time employees of the Contractor and shall possess any and all licenses and other authorizations required to perform such services. Such personnel shall have the training and experience necessary to explain to participants the operation of the investment funds and the requirements of eligible deferred compensation plans.

C. In addition to personnel to assist in enrollment of participants, the Contractor will provide support personnel on an as-needed basis to provide technical and/or marketing assistance to Plan participants or City staff who perform deferred compensation functions.

D. The Contractor shall maintain telephone access for participants to conduct transactions (fund to fund transfers, contribution allocation changes, changes of address) and to obtain information including investment fund information, contribution allocations, account balances, transaction status, daily net asset value ("NAV"), performance information, requests for literature and forms, benefit pay status, and tax withholding and benefit illustrations. Telephone access will be provided by:

1. A toll-free telephone line for participant access to the Contractor's service representatives, with specialized lines for Spanish-speaking participants and for the hearing impaired. The line will be available to participants Monday through Friday, from 5:30 a.m. to 6:00 p.m. Pacific Time.

2. An Automated Service Line (ASL) on a 24-hour per day basis, including weekends (except for downtime for maintenance), to allow participants using a touch-tone telephone to make fund to fund transfers and change investment allocations; to obtain information on share prices, performance information, account balances, investment allocations, and investment performance; and to transfer to a customer service representative during the Contractor's normal business hours.

E. The Contractor will provide the City and participants access to a City-specific Web Site on the Internet to permit fund transfers and investment allocation changes, to provide for participant statements on demand, and to provide pie chart graphics of personal accounts, fund performance graphics, and a

retirement planning calculator (which enables participants to create “what-if” scenarios to obtain information on interest earnings under various scenarios). The Web Site shall be available at the Contractor-provided kiosks, and shall be updated on a daily basis. The Contractor will:

1. Employ a “firewall” to prevent unauthorized access to the Contractor’s internal computing environment; and
2. Require participants to use an access password in order to enhance confidentiality and privacy of participants who request access to their account information.

F. The Contractor shall ensure that all participant deferrals to the Plan for investment in funds offered by the Contractor are allocated to the various funds in the amounts specified by the participant or the City, and shall process all payments in accordance with applicable state, federal and securities laws and regulations.

1. All deferrals, contribution allocation instructions and transfer information received in good order by 1:00 p.m. Pacific Time shall be processed on the day of receipt at the price as of the close of business on that day. Deferrals, contribution allocation instructions or transfer information received after 1:00 p.m. Pacific Time shall be processed no later than the next business day at the price as of the close of business on the day processed. In the event the Contractor fails to timely process transactions as provided in this paragraph, the Contractor shall credit accounts as though the transactions were timely processed and the Contractor shall bear any financial loss resulting therefrom.
2. Where fund transfer or contribution allocation instructions are received from a Plan participant, the Contractor shall send a confirmation statement to the participant. The confirmation statement for a fund transfer shall include the number of shares/units, the price per share/unit, and the cash value for both the fund from which and the fund to which the transfer was made.

G. The Contractor shall accept deferrals from the City by check or by Electronic Fund Transfer (EFT), at no cost to the City or the participants.

SECTION 6. RECORDKEEPING SERVICES.

A. The Contractor shall provide administrative and recordkeeping services for all participant accounts with investments in funds provided by the Contractor. Such services shall include:

1. Maintaining records for each participant in a format acceptable to the Secretary to the DCAC and the City’s Director of Finance including, but not limited to:
 - a. The participant’s sub-account number.

- 1 b. For each reporting period, the amount of the participant's deferral
2 to funds offered by the Contractor and the allocation of such
3 deferral to the each of the funds selected by the participant.
- 4 c. The account balance from inception to the date of each report.
- 5 d. The balance in each fund at the beginning of each reporting
6 period and at the end of each reporting period.
- 7 e. The activity in each fund (including fund transfers and the number
8 of shares/units, price per share/unit and cash value of each fund
9 transfers) for the reporting period and the interest/earnings
10 credited during the period.
- 11 f. The amount of any distribution made during the reporting period.
- 12 g. The current number of shares/units, NAV, and cash value of each
13 fund.
- 14 h. Other pertinent data necessary for the efficient administration of
15 each participant's account.
- 16 2. Receiving participant and City instructions via multiple media, including
17 the Internet, electronic data transfer from the City, toll-free telephone
18 line, and hard-copy forms.
- 19 3. Processing all transactions, including deferrals, fund transfers, and
20 disbursements.
- 21 4. Maintaining all holdings and transaction activity on the Contractor's
22 computer system in a format acceptable to the Secretary to the DCAC
23 and the City's Director of Finance.
- 24 5. Transmitting account and plan information to participants and the City
25 via multiple media, including the Internet, kiosks, quarterly statements,
26 diskette, and toll-free telephone line.
- 27 B. The Contractor shall work with City staff to establish an electronic data
28 transfer link for the City to transmit payroll deduction information to the
29 Contractor. The City may also send such information by magnetic tape for
30 processing by the Contractor.
- 31 C. The Contractor shall maintain a disaster recovery program including storing
32 copies of all essential records on optical disks or microfiche at an off-site
33 location and shall test, or cause to be tested, off-site procedures a minimum
34 of three (3) times per year. It is understood that the Contractor may use the
35 services of SunGard Recovery Services to maintain the off-site location. The
36 Contractor shall notify the DCAC in the event the Contractor utilizes another
37 off-site maintenance company.
- 38 D. The Contractor shall perform data back-up on a daily basis: back-up of
39 critical recordkeeping data at least three times each business day, twice at
40 critical processing points and again at the end of the processing day. In

addition, the Contractor will perform daily incremental back-ups of test and production data on a Monday through Thursday basis, and weekly back-ups of full production data each Friday.

SECTION 7. SELF-DIRECTED BROKERAGE ACCOUNTS.

[Specific provisions depend on proposal accepted.]

SECTION 8. LOAN PROGRAM.

[Whether or not a Loan Program is included will be determined by the DCAC upon receipt and evaluation of proposals. Specific provisions depend on proposal accepted, if any.]

SECTION 9. INVESTMENT ADVICE PROGRAM.

[Specific provisions depend on proposal accepted.]

SECTION 10. EDUCATION PROGRAM.

A. The Contractor, at the Contractor's sole cost and expense, shall design and prepare a comprehensive education program for City employees. The education program shall include, but not be limited to:

1. Fundamentals of investing, including: the effects of risk on investment and how to manage investments to reduce risk, how to read a prospectus and related materials, how to monitor and evaluate funds, characteristics of various funds, and asset allocation.
2. Retirement planning.
3. Fundamentals of deferred compensation, including tax benefits, eligibility for withdrawals, withdrawal options, restrictions on deferrals, catch-up provisions, and investment options available.
4. Explanation of fees and expenses incurred with any investment, including an explanation of fees imposed by the Contractor.
5. An explanation of how participants can access account information and conduct transactions via the toll-free telephone line, the Internet, and the Contractor-provided kiosks.

6. *[An explanation of the Loan Program – if a Loan Program is included.]*

B. To implement the education program, the Contractor shall develop and prepare, at the Contractor's sole cost and expense, educational materials on the topics listed above for distribution to participants. However, the Contractor shall not distribute any materials to participants without the prior approval of the DCAC.

- 1 C. The Contractor shall conduct a minimum of _____ (___)
2 seminars/workshops per year for Plan participants, at the Contractor's sole
3 cost and expense. Seminars/workshops will be held at City facilities
4 identified by the Secretary to the DCAC. Seminar/workshop topics will
5 include:
- 6 1. Basic deferred compensation information
 - 7 2. Investment and financial planning
 - 8 3. Asset allocation
 - 9 4. Retirement planning
 - 10 5. Distribution planning
 - 11 6. Other topics mutually agreed by the Contractor and the Secretary to
12 the DCAC.

13 **SECTION 11. DISBURSEMENTS AND TAX WITHHOLDING.**

- 14 A. When the Contractor is notified of a request for disbursement (other than
15 hardship withdrawals), an account representative of the Contractor will
16 contact the participant for the purpose of arranging to meet with the
17 participant to provide individual counseling regarding disbursement options
18 and to notify the participant of the availability of the Contractor's toll-free
19 customer service number. If the participant desires such a meeting, the
20 account representative will meet with the participant to assist the participant
21 with the selection of a disbursement option.
- 22 1. The disbursement meeting shall include a review of the participant's
23 personal and financial retirement objectives, how the participant's
24 retirement income stream can meet those objectives, and the amount
25 and duration of payments from the deferred compensation plan
26 necessary to meet the objectives.
 - 27 2. The Contractor representative will prepare benefit illustrations to assist
28 the participant in understanding the economic impact the duration and
29 income requirements will have on the participant's deferred
30 compensation assets.
 - 31 3. The Contractor representative will discuss with the participant the
32 impacts money management decisions can have on the income the
33 participant receives.
 - 34 4. The Contractor representative will assist the participant in filling out the
35 necessary disbursement forms and will deliver the forms to the
36 Secretary to the DCAC for approval.
- 37 B. The Contractor shall issue disbursements, including hardship withdrawals, in
38 accordance with the disbursement form submitted by the participant or the
39 City, the terms of the Plan, and the requirements of Section 457 of the

Internal Revenue Code and applicable Treasury Regulations. In the event the City or the Contractor terminates this Agreement, the Contractor shall be obligated to make disbursements only to the extent that funds are still available in the account of the City.

C. The Contractor shall compute and deduct from the disbursements all state and federal income taxes required to be withheld from Plan distributions. The Contractor will forward to the applicable taxing authority a detailed report of such withheld taxes within the timeframe prescribed by law.

D. The Contractor shall prepare and forward to the applicable taxing authority and the participant, the appropriate tax reporting forms (e.g., Form W-2) within the timeframe prescribed by law.

E. For each participant receiving distributions from the Plan, the Contractor shall perform an initial distribution test and shall perform annual distribution testing thereafter to confirm compliance with the distribution requirements of the Plan and of Section 457 of the Internal Revenue Code. The Contractor shall promptly notify the Secretary to the DCAC of any distribution which is not in compliance with such requirements and shall assist the City in taking appropriate action to correct any noncompliance.

SECTION 12. REPORTS.

A. The Contractor will provide the following reports to participants, in a format acceptable to the DCAC:

1. Quarterly financial reports providing at least the following information:

a. The total account balance at the beginning of the reporting period, the total contributions to the account and the total interest/earnings credited to the account during the reporting period, and the account balance at the end of the reporting period.

b. For each fund in the account, the fund balance at the beginning of the reporting period, the total contributions to the fund and the total interest/earnings credited to the fund during the reporting period, and the fund balance at the end of the reporting period.

c. For each fund in the account, the number of shares/units and the value of each share/unit in the fund at the beginning of the reporting period and at the end of the reporting period.

d. The contribution allocation as of the end of the reporting period.

e. The date and amount of each contribution to the account, and the total amount of contributions made during the reporting period.

f. The activity in the account during the reporting period listed by fund and including: the date the activity occurred; the type of

- 1 activity (e.g., contribution, earnings, fund transfer) on each activity
2 date; for each contribution, the amount of the contribution, the
3 number of shares/units added, the price per share/unit, and the
4 total shares/units in the fund after each contribution; for each fund
5 transfer, the amount transferred and the number of shares/units
6 and the share/unit price for both the fund from which and the fund
7 to which the transfer occurred.
- 8 g. The distributions, including hardship withdrawals, made from the
9 account during the reporting period.
- 10 2. Informational mailings, including *[depends on proposal accepted]*.
11 The Contractor will customize reports to the specific funds offered to
12 Plan participants. The Contractor may provide additional or
13 alternative publications, or may vary the frequency of distribution, upon
14 the approval of the DCAC.
- 15 B. The Contractor will provide the following reports to the DCAC, in a format
16 acceptable to the DCAC:
- 17 1. A monthly performance report showing the performance of each fund,
18 net of fees, for at least:
- 19 a. The reporting month.
20 b. The year to date.
21 c. The last twelve months.
22 d. Cumulative returns for the preceding 3-year, 5-year, and 10-year
23 periods (where available).
- 24 2. The informational mailings to participants listed in paragraph 2 of
25 subsection A above.
- 26 C. The Contractor will provide the following reports to the City's Finance
27 Department, in a format acceptable to the City's Director of Finance:
- 28 1. A monthly transaction statement showing for the total City account and
29 for each fund in the account at least: the beginning balance, the
30 ending balance, and the amount of contributions, the amount of
31 distributions, any adjustments made, fund-to-fund transfers made,
32 plan-to-plan transfers made, earnings, service fees, and fee credits
33 occurring during the month.
- 34 2. A monthly list of Plan participants with investments in funds offered by
35 the Contractor and the status of each participant (e.g., active, inactive,
36 deferred distribution, distribution).
- 37 3. Such other reports as agreed by the Contractor and the City's Director
38 of Finance.

SECTION 13. PERFORMANCE STANDARDS.

*[Refer to Section 9: Performance Standards/Guarantees in the proposal
submittal form in the Request for Proposals]*

SECTION 14. RESPONSIBILITIES OF THE CITY.

A. The City shall provide timetables, procedures and facilities for:

1. Group meetings of participants for distribution of information about the Plan and seminars/workshops.
2. Counseling and enrollment of participants.
3. Completion of forms by participants.
4. Payroll deduction of deferrals.

B. The City shall cause appropriate deductions to be made from the appropriate City payrolls according to the participation agreement between the Contractor and the individual participant. The City shall send to the Contractor, by check or wire transfer, the amount of the total applicable deductions.

1. Deferrals by check shall be sent to:

or to such other address as is specified in writing by the Contractor.

2. Deferrals by wire transfer shall be sent to:

or to such other facility or in such other manner as is specified in writing by the Contractor.

C. The City agrees to transmit on a timely basis any relevant participant information as is necessary for the Contractor to carry out its responsibilities as Plan administrator to each participant upon:

1. Entry into the Plan.
2. Changes in an individual participant's account.
3. Withdrawal, termination or request for distribution under the Plan, including the method and timing for any distribution.

D. The City will send payroll deduction information to the Contractor by electronic data transfer link (when established by the City and the Contractor) or by magnetic tape for processing by the Contractor.

E. The City will use its best efforts to assure the accuracy and completeness of all participant information provided by the City. The Contractor shall be entitled to rely upon the accuracy of information that is furnished to it by the Director of Finance, the City Manager, the Secretary to the DCAC, or the designee of any of these officers, and the Contractor shall not be responsible for any error arising from its reasonable reliance on such information. In the event the City or the Contractor discovers an error in such information, the Contractor will assist the City in making appropriate corrections.

SECTION 15. CITY ADMINISTRATIVE FEES.

A. The Contractor shall pay to the City an annual administrative fee to recover the City's costs of Plan program operations.

B. Beginning the second quarter of Fiscal Year 2006-2007, the Contractor will remit to the City, on a *[monthly, quarterly basis]*, an administrative fee based on *Insert if multiple providers: a pro-rata share of* the DCAC annual budget.

1. For FY 2006-2007, the annual budget for the purpose of calculating the administrative fee shall be Three Hundred Seventy Thousand Dollars (\$370,000). The annual budget shall be increased on an annual basis by the increase in the Consumer Price Index for San Francisco-Oakland-San José on a May-to-May basis. In the event the index is not published for May, the calculation shall be based on a twelve-month change beginning with the index published immediately preceding the month of May. In the event there is a decrease in the Consumer Price Index, the annual budget adjustment for that year shall be zero. The budget adjustment shall be effective July 1 of each year of the term of this Agreement.

2. *[Insert if multiple providers: The Contractor's pro-rata share of the DCAC annual budget shall be the annual budget multiplied by the fraction whose numerator is the total value of the assets invested by participants with the Contractor and whose denominator is the total value of the assets invested by the participants in the Plan. The value of the assets shall be determined as of the June 30 immediately preceding the July 1 budget adjustment. For the purpose of this calculation, "assets" shall not include any assets invested through a brokerage option.]*

C. Upon the direction of the DCAC, in addition to the pro-rata share of the DCAC annual budget, the Contractor shall remit an asset-based fee based on the cash value of the Plan assets administered by the Contractor. The DCAC may increase or decrease the percentage rate of the fee based upon projections of program costs. The DCAC shall notify the Contractor of any

such change and the Contractor shall implement the change on the date specified by the DCAC, which date shall not be less than thirty (30) days after the date of the DCAC's notice to the Contractor. The Contractor may deduct the asset-based fee from the participants' accounts.

D. The amount to be paid to the City for each quarter shall be the sum of the amounts calculated for each day in the quarter at the prorated daily amount of the administrative fee rate then in effect multiplied by the cash value of the assets as of the end of each day for which the fees are assessed. The Contractor shall credit the deducted fees with a short term rate of interest, and shall remit the fees, plus any interest accrued thereon, to the City on a quarterly basis within thirty (30) days from the end of each quarter of the term of this Agreement.

E. The Contractor and the City agree that each will provide participants with full disclosure of the provisions of this SECTION 14.

SECTION 16. COMPENSATION.

A. The Contractor may charge participant accounts for the Contractor's administrative fee and investment management fees in amounts not to exceed the amounts set forth in EXHIBIT A, entitled "COMPENSATION", which is attached to and incorporated in this Agreement.

B. The administrative fee and the investment management fees (including fund expenses) shall accrue on a daily basis and shall be paid by each account monthly, in arrears, and shall be charged at one-twelfth of the annual rates set forth in EXHIBIT A. The annual fees are calculated based upon the average daily net assets invested in the particular fund.

C. *[Insert if multiple providers: In the event a participant transfers his or her total account balance from the Contractor to a Plan investment provider other than the Contractor, the Contractor may deduct a pro-rated fee from the account prior to the transfer of the funds. The pro-rated fee shall be the fee that would have been paid for the month multiplied by the fraction whose numerator is the number of days in the month prior to the transfer and whose denominator is the number of days in the month.]*

D. The Contractor shall credit to the applicable fund any and all 12b-1 fees and any and all recordkeeping refunds received from investment companies.

E. The Contractor shall not charge the City for any services performed pursuant to this Agreement.

F. The Contractor shall not charge any acquisition fees (e.g., commissions, loads, or similar expenses), any fees for contract charges or operating expenses other than those specified in subsection A above, and shall not charge any surrender charges (e.g., fees to liquidate assets or transfer assets) except as provided in subsection C above.

1 G. The Contractor shall disclose all applicable fees to the participant at the time
2 of the participant's enrollment.

3 H. The fees set forth in this SECTION 16 shall be full compensation to the
4 Contractor for all services performed under this Agreement and for all
5 expenses incurred in the performance of such services.

6 **SECTION 17. INDEPENDENT CONTRACTOR.**

7 It is understood and agreed that the Contractor, in the performance of the work
8 and services pursuant to this Agreement, shall act as and be an independent contractor
9 and not an agent or employee of the DCAC or the City of San José. It is further
10 understood and agreed that neither the Contractor nor any of its officers, employees or
11 agents shall obtain any right to retirement benefits, worker's compensation benefits or
12 other benefits or privileges which accrue to City employees, and the Contractor hereby
13 expressly waives any claim it may have to any such rights.

14 **SECTION 18. CONFIDENTIALITY.**

15 The Contractor shall maintain strict confidence with respect to all data furnished
16 to the Contractor by the City or the DCAC and shall not disclose to any person any
17 information received by the Contractor in the course of performance of this Agreement
18 except as authorized by the DCAC, the Secretary to the DCAC, the City Manager, the
19 City Attorney, or a designated representative of any of the foregoing, or as required by
20 law or by judgment of any court of competent jurisdiction.

21 **SECTION 19. CONFLICT OF INTEREST.**

22 A. The Contractor shall avoid all conflict of interest and the appearance thereof
23 in the performance of this Agreement.

24 B. For each person performing professional services pursuant to this
25 Agreement, the Contractor shall file with the City Clerk a disclosure statement
26 (Statement of Economic Interests - Form 700) which includes disclosure of
27 such person's investments, interests in real property, income, loans, gifts, and
28 business positions relating to persons, business entities and other sources
29 related to or connected with: brokers who purchase or sell investment
30 products or securities for the investment vehicles provided by the Contractor
31 to Plan participants; companies, firms, banks or other entities whose
32 investment products or securities are included in or are a part of the
33 investment vehicles provided by the Contractor to Plan participants;
34 investment providers other than the Contractor who provide investment
35 management services or investment products for Plan participants.

36 **SECTION 20. THE CONTRACTOR'S RECORDS.**

37 A. The Contractor shall maintain any and all ledgers, books of account, invoices,
38 vouchers, canceled checks, and other records or documents evidencing or
39 relating to charges for services, or expenditures and disbursements charged

1 to the City for a minimum period of four (4) years, or for any longer period
2 required by law, from the date of the expiration or earlier termination of this
3 Agreement. Such records shall be maintained in an electronic format
4 approved by the City.

5 B. The Contractor shall maintain all documents and records which demonstrate
6 performance under this Agreement for a minimum period of four (4) years, or
7 for any longer period required by law, from the date of expiration or earlier
8 termination of this Agreement.

9 C. Any records or documents required to be maintained pursuant to this
10 Agreement shall be made available for inspection or audit, at any time during
11 regular business hours, upon written request by the City Attorney, the City
12 Auditor, the City Manager, the Secretary to the DCAC, or a designated
13 representative of any of these officers. Copies of such documents shall be
14 provided for inspection at City Hall when it is practical to do so. Otherwise,
15 unless an alternative is mutually agreed upon, the records shall be available
16 at the Contractor's address indicated for receipt of notices in this Agreement.

17 D. Where the City has reason to believe that such records or documents may be
18 lost or discarded due to dissolution, disbandment or termination of the
19 Contractor's business, the City may, by written request by any of the above-
20 named officers, require that custody of the records be given to the City and
21 that the records and documents be maintained in City Hall. To the extent
22 required by applicable law, the Contractor may retain originals of such
23 records and documents and provide a copy to the City. Access to such
24 records and documents shall be granted to any party authorized by the
25 Contractor, the Contractor's representatives, or the Contractor's successor-in-
26 interest.

27 **SECTION 21. HOLD HARMLESS.**

28 The Contractor shall defend, indemnify and hold harmless the DCAC and the
29 City and their officers and employees against any and all claims, losses or liabilities
30 arising out of or resulting in any way from work performed under this Agreement due to
31 the willful or negligent acts (active or passive) or omissions by the Contractor or the
32 Contractor's officers, employees, subcontractors or agents. The acceptance of said
33 services and duties by the DCAC or the City shall not operate as a waiver of such right
34 of indemnification.

35 **SECTION 22. ASSIGNMENT.**

36 The Contractor shall not assign, transfer or convey this Agreement nor any of the
37 Contractor's rights, duties or obligations hereunder, nor any part thereof, without the
38 prior written consent of the DCAC. In the event the Contractor attempts to so assign,
39 transfer or convey this Agreement or any of the Contractor's rights, duties or obligations
40 hereunder, such assignment, transfer or conveyance shall be void and of no effect.
41 The use of a subcontractor to perform services pursuant to this Agreement shall not

constitute an assignment, transfer or conveyance of this Agreement or of the Contractor's rights, duties or obligations hereunder, provided that the subcontractor is identified in this Agreement or the DCAC has provided written approval prior to the commencement of any work or services by the subcontractor, that the Contractor be solely responsible for any and all payments due to the subcontractor for the performance of the subcontractor's services, and that the Contractor be solely responsible for the proper performance by the subcontractor.

SECTION 23. NONDISCRIMINATION.

The Contractor shall not discriminate, in any way, against any person on the basis of age, sex, actual or perceived gender, race, color, creed, national origin, religion, sexual orientation, marital status, or disability in connection with or related to the performance of this Agreement.

SECTION 24. COMPLIANCE WITH LAWS.

The Contractor shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments.

SECTION 25. WARRANTIES OF THE CONTRACTOR.

The Contractor represents and warrants that:

- A. The Contractor is an investment adviser registered as such with the Securities and Exchange Commission ("SEC") under the Investment Advisers Act of 1940, as amended. ICMA-RC Services, Inc. (a wholly-owned subsidiary of the Contractor) is registered as a broker-dealer with the SEC and is a member in good standing of the National Association of Securities Dealers.
- B. The Contractor is duly authorized under all applicable laws and regulations to provide the services contemplated under this Agreement. The Contractor shall immediately notify the DCAC if any license, certification or other authorization required for the Contractor to perform said services is revoked, expires without renewal, or is otherwise no longer in effect.
- C. The personnel of the Contractor responsible for discharging the Contractor's duties and obligations under this Agreement are individuals experienced in the performance of the various functions contemplated by this Agreement.

SECTION 26. WAIVER.

The waive by the City, the DCAC or the Contractor of any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein nor a waiver of any subsequent breach or violation of the same or any other term or condition. The acceptance by the City or the DCAC of the performance of any work or services by the Contractor shall not be deemed to be a waiver of any term or condition of this Agreement.

SECTION 27. GIFTS.

- A. The Contractor is familiar with City of San José prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code.
- B. The Contractor agrees not to offer any City officer or designated employee any gift prohibited by said Chapter.
- C. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this Agreement by the Contractor. In addition to any other remedies the DCAC or the City may have in law or equity, the City may terminate this Agreement for such breach as provided in SECTION 29 of this Agreement.

SECTION 28. DISQUALIFICATION OF FORMER EMPLOYEES.

The Contractor is familiar with the provisions relating to the disqualification of former officers and employees of the City of San José in matters which are connected with former duties or official responsibilities as set forth in Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance"). The Contractor shall not utilize either directly or indirectly any officer, employee, or agent of the Contractor to perform services under this Agreement, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

SECTION 29. GOVERNING LAW.

The law of the State of California shall govern the rights, obligations, duties and liabilities of the parties to this Agreement and shall govern the interpretation of the terms and provisions hereof.

SECTION 30. VENUE AND SERVICE OF PROCESS.

- A. The parties specifically agree that any litigation between them concerning or arising out of this Agreement shall be filed and maintained exclusively in the Superior Court of the County of Santa Clara, State of California, or where otherwise appropriate, exclusively in the United States District Court, Northern District of California, San José, California. Each party consents to service of process in any manner authorized by California law.
- B. The Contractor's California address for service of process is:

SECTION 31. INSURANCE REQUIREMENTS.

The Contractor shall have and maintain the insurance coverage set forth in EXHIBIT B, entitled "INSURANCE," which is attached hereto and incorporated herein. All policies, endorsements, certificates and/or binders shall be subject to approval by the Risk Manager of the City of San José as to form and content. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. The Contractor agrees to provide the Risk Manager with a copy of the certificates of insurance and original endorsements specified in EXHIBIT B before any payment is made to the Contractor under this Agreement.

SECTION 32. TERMINATION.

- A. The City or the Contractor shall have the right to terminate this Agreement, without cause, by giving not less than one hundred twenty (120) days' written notice of termination to the other.
- B. If the Contractor fails to perform any of its material obligations under this Agreement, in addition to all other remedies provided by law, the City may terminate this Agreement immediately upon written notice.
- C. The DCAC is authorized to terminate this Agreement on behalf of the City.
- D. In the event of termination, the Contractor shall deliver to the City or to a third party designated by the City, in a format approved by the City, copies of all reports, documents, and other work performed by the Contractor under this Agreement, and upon receipt thereof, the City shall cause payment to be made to the Contractor for services performed and reimbursable expenses incurred to the date of termination.
- E. In the event the Contractor terminates this Agreement, the Contractor shall bear all costs incurred by the City or the DCAC in connection with the transfer of participant accounts to another provider.

SECTION 33. USE OF MATERIALS.

The City may use all reports, documents or other materials developed or discovered by the Contractor or any other person engaged directly or indirectly by the Contractor to perform the services required hereunder without restriction or limitation. The Contractor may retain copies of all such reports, documents or other materials which are necessary for the Contractor to maintain compliance with any applicable law, rule or regulation.

SECTION 34. TRANSITION SERVICES.

- A. *[For transition for investment provider services beginning October 1, 2006: Insert Transition Plan for accepted proposer.]*
- B. In the event the Contractor is not awarded an agreement to continue to provide services following the expiration or earlier termination of this

Agreement, the Contractor shall cooperate fully with the City and any subsequent investment provider(s) to assure a smooth transition of services described in this Agreement. Such cooperation shall include, but not be limited to: transfer of computer data, files and/or tapes; providing adequate staff and support personnel to complete performance of all services under this Agreement through the date of completion of the transition; completion of all outstanding investment transactions; and providing all reports and data required by this Agreement.

SECTION 35. NOTICE ADDRESSES.

Except as otherwise provided in this Agreement, all notices and other communications between the parties which are contemplated by this Agreement shall be deemed given when deposited in the United States mail postage prepaid or when personally delivered or sent by e-mail or facsimile to the parties as specified in this SECTION 35.

To the City: Deferred Compensation Advisory Committee
Employee Services
200 East Santa Clara Street
San José, CA 95113
Fax: _____
E-mail: _____ with a copy to

To the Contractor: _____

Fax: _____
E-mail: _____

SECTION 36. NONEXCLUSIVE AGREEMENT.

[Insert if multiple providers: nothing in this Agreement shall be deemed to mean that the Contractor has an exclusive agreement for the administration of the Plan or for providing investment vehicles for Plan participants. The City may have agreements with other persons for the administration of the Plan or the providing of investment vehicles for Plan participants.]

SECTION 37. ENTIRETY.

This Agreement and the exhibits attached hereto constitute the entire agreement and understanding between the parties regarding the matters set forth in this Agreement. No prior negotiations, correspondence, conversations or understandings applicable to the matters in this Agreement shall be of any force or effect unless

1 specifically included in this written Agreement. This Agreement may be changed or
2 modified only by a written amendment signed by the City and the Contractor.

3 **SECTION 38. SEVERABILITY.**

4 In the event any provision of this Agreement is found by a court of competent
5 jurisdiction to be invalid, void or unenforceable, the remaining provisions of this
6 Agreement shall nevertheless remain and continue in full force and effect, provided that
7 the continuation of such remaining provisions does not materially change the duties or
8 obligations of either party from those duties and obligations originally contemplated by
9 this Agreement.

10 **WITNESS** the execution of this Agreement on the dates set forth below each
11 signature:

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal
corporation

SUSAN DEVENCENZI
Senior Deputy City Attorney

By: _____
_____, Chairperson
DEFERRED COMPENSATION
ADVISORY COMMITTEE

Date: _____

_____, a
_____ of the State of _____

By: _____
Name
Title

Date: _____

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EXHIBIT A

COMPENSATION

- A. The administration/recordkeeping services and investment management fees which may be charged by the Contractor shall be based on the reasonable market value of the assets on the last business day preceding the month for which the fees are charged. The fees shall not exceed the following rates, except as provided in B, below:

Funds Currently Offered					
ASSET CLASS/Fund	Admin. Fee ¹	Investment Mgmt. Fee	Reallocation/ 12(b)-1 Fees	Mort/Risk - Other	Total Charges ²
<i>MONEY MARKET</i>					
<i>STABLE VALUE</i>					
<i>BOND</i>					
US Treasury					
<i>BALANCED</i>					
<i>GROWTH & INCOME</i>					
<i>GROWTH</i>					
<i>INTERNATIONAL</i>					
<i>INDEX</i>					

- B. It is understood that the investment management fees may include subadvisor, mutual or commingled fund, custodial, and operating costs which are not set by the Contractor. The investment management fees may vary from year to year and from fund to fund. In the event the investment management fees for any fund increase during the term of this Agreement such that the total fee for that fund would exceed the total fee set forth above, the Contractor shall immediately notify the DCAC and shall provide a full explanation of the change in the fee. The Contractor shall not increase fees to Plan participants above those out above unless specifically authorized by the DCAC.

In the event the investment management fee for any fund decreases during the term of this Agreement, the Contractor shall immediately notify the DCAC and shall apply the decrease to lower the total fee charged to participant accounts.

END OF EXHIBIT A

EXHIBIT B

INSURANCE REQUIREMENTS

The Contractor, at the Contractor's sole cost and expense, shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damage to property which may arise from, or in connection with, the performance of the services hereunder by the Contractor, its agents, representatives, employees, or subcontractors.

A. Minimum Scope of Insurance.

Coverage shall be at least as broad as:

1. Insurance Services Office Commercial General Liability coverage ("occurrence" Form Number CG 0001), including products and completed operations; and
2. Insurance Services Office Form No. CA 001 covering Automobile Liability, code 1 "any auto" or code 2 "owned autos" and endorsement CA 0025. Coverage shall also include code 8 "hired autos" and code 9 "non-owned autos".
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors and Omissions insurance.

B. Minimum Limits of Insurance.

The Contractor shall maintain limits no less than:

1. Commercial General Liability: US\$1,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this Agreement or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: US\$1,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of US\$100,000 per accident.
4. Professional Errors and Omissions: US\$5,000,000 aggregate.

C. Deductibles and Self-Insured Retentions.

Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, the DCAC, their officers, employees, agents, and contractors; or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City's Risk Manager.

D. Other Insurance Provisions.

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability Coverage:

- a. The City of San José, the Deferred Compensation Advisory Committee, their officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of the Contractor; products and completed operations of the Contractor; and automobiles owned, leased, hired or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to City, the DCAC, their officers, employees, agents and contractors.
- b. The Contractor's insurance coverage shall be primary insurance as respects City, the DCAC, their officers, employees, agents and contractors. Any insurance or self-insurance maintained by City, the DCAC, their officers, employees agents or contractors shall be excess of the Contractor's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by the Contractor shall not affect coverage provided City, the DCAC, their officers, employees, agents or contractors.
- d. Coverage shall state that the Contractor's insurance shall apply separately to each insured against who claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. All Coverages

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to the City.

E. Acceptability of Insurers.

Insurance is to be placed with insurers acceptable to City's Risk Manager.

F. Verification of Coverage.

The Contractor shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the City's Risk Manager:

Risk Management
Finance Department
City of San José
200 East Santa Clara Street
San José, CA 95113-1905

G. Subcontractors.

The Contractor shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

H. Amendment/Modification of Insurance Requirements

These insurance requirements may be amended or waived by the mutual agreement of the Contractor and the City Risk Manager, provided the City Risk Manager determines that the amendment or modification will not substantially increase the DCAC's or City's liability for activities permitted under this Agreement.

END OF EXHIBIT B